IN THE

Supreme Court of the United States

OCTOBER TERM, 1976
No. 76-235

E. ALVEY WRIGHT,
DIRECTOR, HAWAII DEPARTMENT OF TRANSPORTATION,

Petitioner,

-v.-

STOP H-3 ASSOCIATION, *et al.*

Respondents.

BRIEF FOR RESPONDENT STOP H-3 ASSOCIATION, *et al.* IN OPPOSITION TO BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF ISSUANCE OF WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTORY STATEMENT

Although Respondent Stop H-3 Association believes the Motion by the State of Washington to file an Amicus Curiae brief is untimely made within the scope of Rule 42 of the Rules of the Supreme Court of the United States, they must respond to the following arguments made by the State of Washington should this Motion subsequently be granted.[1]

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[1] Respondent must also correct the statutory error in petitioners' reply brief quoting the National Historical Preservation Act. Section 106 of the Act (Pet. R. Br. App. 6) has been amended by Pub. L. No. 94-422 §201 (3) (September 28, 1976) by inserting after the word "included in" the phrase "or eligible for inclusion in." Now under the act both of these determinations constitute finding of an historic site.

QUESTION PRESENTED

Whether the determinations of the Secretary of Transportation and the Advisory Council on Historic Preservation that a project will "adversely affect" a historic site constitute a "use" within the meaning of 23 USC §138.

STATEMENT

The State of Washington assumes that the Ninth Circuit unilaterally took upon itself the responsibility of determining the "use" (T)H-3 would have on the petroglyph rock, Pohuku ka Luahine. It further argues that the Secretary of Transportation should have been afforded the opportunity to rule in this matter prior to the decision of the Ninth Circuit.

This assumption ignores one important fact. In the case of (T)H-3 it was the Secretary of Transportation acting in cooperation with the Advisory Council on Historic Preservation who determined that the petroglyph rock would be adversely affected by the highway project.

ARGUMENT

The State of Washington concludes from Judge Wallace's dissent that there was no evidence before the Ninth Circuit for it to rule on whether (T)H-3 would constitute a "use" of the petroglyph rock within the meaning of 23 USC §138. However, this assumption ignores the extensive documentation that took place both at the administrative level and before the District Court. This documentation was also included in the Record on Appeal.

More specifically, in discussions between the Advisory Council on Historic Preservation and the respective Federal and State highway officials it was clearly demonstrated and unquestioned that (T)H-3 would adversely affect the petroglyph rock. In fact, further consultation ended with the reaching of a tentative agreement on measures to mitigate the *adverse* effects of (T)H-3 on this property in June of 1974. *See* 36 CFR §800.5(f) (1975). Respondent believes this agreement presumes a "use" of the petroglyph for purposes of §4(f). *See* 36 CFR §800.4(b)(c) (1975).

Subsequently, the respective Federal and State highway officials met before the Advisory Council on August 7 and 8, 1974, to further discuss the adverse effect of (T)H-3 on not only the petroglyph rock but all of the Moanalua Valley as well. The conclusion of the Council as pertains to the petroglyph was as follows:

> 1. *Pohaku ka Luahine*–In applying the Advisory Council's "Criteria of Adverse Effect" the Council concludes that construction of the proposed H-3 will have an *adverse effect on the National Register property by isolating the property from its surrounding environment, and by introducing visual, audible and atmospheric elements that are out of character with the property and alter its setting*. (Emphasis supplied)

Clearly, then, all concerned administrative personnel including the Secretary of Transportation realize that (T)H-3 will adversely affect the petroglyph rock. The question then becomes whether such impact constitutes a "use" within the meaning of 23 USC §138.

Although the precise meaning of what constitutes a "use" is not defined under the law, a consistent and long-standing administrative practice of the Department of Transportation (hereafter referred to as DOT) is to treat a project as one which "uses" 4(f) lands if the project (1) "physically occupies the land" or (2) generates "sufficiently serious impacts on the land as to impair substantially the utility of the land for the purposes for which it was used before the off-site DOT activity was undertaken." *See* Gray, *Section 4(f) of the Department of*

Transportation Act, 32 Md. L. Rev. 327, 358 n. 72 (1973)[2]. Stated more simply, DOT will treat a protected site if the project will directly or indirectly cause a substantial and *adverse impact* on the site.[3]

The case law adopts this interpretation, and elaborates on it. *Brooks v. Volpe*, 460 F.2d 1193, 1194 (9th Cir. 1972), rev'g. 319 F.Supp. 90 (W.D. Wash. 1970), 329 F. Supp. 118 (W.D. Wash. 1971), on remand 350 F. Supp. 287 (W.D. Wash. 1972); *Conservation Society of Southern Vermont v. Secretary of Transportation*, 362 F. Supp. 627, 639 (D. Vt. 1973); *Citizens for Mass Transit v. Brinegar*, 357 F. Supp. 1269, 1280 (D. Ariz. 1973); *Arizona Wildlife Federation v. Volpe*, 4 ERC 1637, 1638-9 (D. Ariz. 1972); *D. C. Federation of Civic Assns. v. Volpe*, 459 F.2d 1231, 1239 (D.C. Cir. 1971) supplementing 434 F.2d 436 (D.C. Cir.), rev'g. 308 F. Supp. 423 (D.D.C), 316 F. Supp. 754 (D.D.C. 1970), reh. den. ___ F.2d. ___ (D.C. Cir.), cert. den. ___ U.S. ___, 92 S.Ct. 1290 (1972).

In *Conservation Society of Southern Vermont v. Secretary of Transportation, supra*, the defendants argued that the bordering

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[2] DOT has recognized the principle that a transportation project can be physically separated from a protected area and still constitute a "use" within the meaning of section 4(f). *DOT Reprint of Statement of Herbert F. DeSimone, Assistant Secretary of Transportation for Environment and Urban Systems, before the Senate Committee on Commerce Regarding S. 728, May 3, 1971*. In this statement he said that DOT "has adopted...[a] broader meaning" of section 4(f) so as to "provide protection" in situations where "a transportation facility is located adjacent to a protected area but does not require the taking of land from it" in "the physical sense, but would substantially interfere with the use to which that land is dedicated." *Id. at 4*. Senate Bill 728, 92d Cong., 1st Sess. (1972), as introduced by Senators Hartke and Hart, would have, *inter alia*, added the words "...has an adverse effect on the environment in..." before "requires the use of land from..." in section 4(f).

[3] As to the criteria of an adverse effect *see* Advisory Council Procedures at 36 C.F.R §800.9 (1975).

of the Lye Brook Backwoods Area, an 11,000 acre wilderness/recreation area, by a proposed federal-aid primary highway would not constitute a use of the area. Relying on, and quoting the controlling language in *Brooks v. Volpe, supra*, the argument is rejected. 362 F. Supp. 627, 639.

In *Citizens for Mass Transit v. Brinegar, supra*, the defendants argued that the construction and utilization of a section of Interstate I-10 in what from the opinion appears to be the approximate vicinity of a public park of undisclosed dimensions would not constitute a use of the park. The argument is rejected.

> This Court is not unmindful that the proposed alignment may be considered a "use" of Berney Park within the meaning of 23 USC §138 even though the actual acreage over which the freeway will pass may be said no longer to be a park of local significance. *Brooks v. Volpe*, 460 F.2d 1193 (9th Cir. 1972). The fact that the remainder of Berney Park is immediately adjacent to the freeway route is enough to require a 4(f) statement. *Id.* 357 F. Supp. 1269, 1280.

In *Arizona Wildlife Federation v. Volpe, supra*, the defendants argued that a federal-aid forest highway project to be built along one side of what appears from the opinion to be a large triangular-shaped recreational area in which are located several lakes would not use the entire area. Citing *Brooks v. Volpe, supra*, and *D.C. Federation of Civic Associations v. Volpe, supra*, the argument is rejected. 4 ERC 1637, 1638-9.

In *D. C. Federation of Civic Association v. Volpe, supra*, the so-called "Three Sisters Bridge" case, the federal defendants acknowledged that because of the actual physical taking of "some parkland" and a portion of the Georgetown Historic District which would result from the construction of an Interstate Highway Bridge over the Potomac, compliance with 23 USC §138 was required, but, in order to limit the scope of that

compliance, argued that a highway uses only those lands which are situated within the right-of-way. The argument is rejected.

> More is at stake, however, than the "minimum taking" of parkland. Section 138 speaks in terms of minimizing "harm" to parkland and historic sites, and the evaluation of harm requires a far more subtle calculation than merely totaling the number of acres to be asphalted. For example, the location of the affected acres in relation to the remainder of the parkland may be a more important determination, from a standpoint of harm to the park, than determining the number of affected acres...In addition, *a project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and "take" it in every practical sense*. (Note omitted) (Emphasis supplied) 459 F.2d 1231, 1239.

Therefore the rule to be applied here is this: Wherever (T)H-3 may, either directly or indirectly, cause a serious adverse impact on the petroglyph rock, the statute applies. Where there is "a substantial question" as to the nature of the impact, the presumption is in favor of the application of the statute. There being *documented* findings by the Secretary of Transportation in the Record on Appeal that an adverse impact is imminent with construction of (T)H-3, Respondents must conclude that the Ninth Circuit was not engaging in a *de novo* determination that a "use" will occur. Rather the Court was merely reiterating a determination made much earlier in the history of (T)H-3.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be denied.

Respectfully submitted,

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*Respondents wish to acknowledge the assistance of John F. Schweigert, Esq. of Honolulu, Hawaii, in the preparation of this Brief.